85-1503

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BRENT C. WATTENBARGER
Petty Officer Third Class, U.S. Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. WHETHER the denial of counsel at a critical stage of extended duration should be tested for harmless error under the standard of *Chapman v. California*?

2. WHETHER the denial of counsel for a period of ninety-five days during which petitioner was declared mentally incompetent and taken before successive sanity boards is inherently prejudicial?

3. WHETHER the United States Court of Military Appeals correctly applied the harmless error standard of *Chapman*?

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Petty Officer Third Class, U.S. Navy,
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v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petty Officer Third Class Brent C. Wattenbarger, U.S. Navy, respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (App. 1a) is reported at 21 M.J. 41 (C.M.A. 1985). The opinion of the United States Navy-Marine Corps Court of Military Review (App. 24a) is reported

at 15 M.J. 1069 (N.M.C.M.R. 1983). The order of the Court of Military Appeals dated January 10, 1986, denying petitioner's request for reconsideration (App. 39a) is reported at 21 M.J. 406 (C.M.A. 1986).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on November 18, 1985, affirming petitioner's conviction of September 23, 1981. The order denying petitioner's request for reconsideration was dated January 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) by filing this petition within 60 days of the order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

> Amendment VI: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On December 4, 1980, petitioner was arrested by Australian police in Exmouth, Australia, for offenses committed that day and was locally confined until December 9, 1980. (AE VI).[1] On that day he was

[1] A motion to dismiss the charges based on the denial of the right to the effective assistance of counsel was litigated at the trial level. In support of the motion, petitioner and his counsel entered into a stipulation of facts with the Government. This stipulation was accepted as evidence on the motion by the trial judge. (R. 15). It was attached to the record of trial as Appellate

turned over to the U.S. military authorities at U.S. Naval Communications Station, Harold E. Holt, Australia. He was confined at the brig there until December 22, 1980.

On December 12, 1980, the only judge advocate[2] stationed aboard Harold E. Holt saw petitioner and advised him of his rights to counsel. (R. 20).[3] Petitioner indicated he wanted no lawyer at that time.

Exhibit VI, and is attached hereto as an Appendix to Appendix A. The enclosures referred to in the stipulation were attached to the record of trial as Appellate Exhibit VII and accepted as evidence by the court. (R. 25). The two will be referred to herein as "AE VI" and "AE VII, enclosure ___," respectively.

[2] A judge advocate must be a graduate of an accredited law school or a member of the bar of a Federal court or of the highest court of a state and must be certified as competent to perform such duties by the Judge Advocate General of the armed service of which he or she is a member. Article 27(b), UCMJ, 10 U.S.C. § 827(b) (1982).

[3] Appellate Exhibit VII, enclosure 9, is the form the judge advocate used to advise petitioner. Entitled *Rights to Counsel Under Paragraph 34(c), MCM, 1969 (Rev.)*, it provided:

> You have the right to be represented by lawyer counsel at an Article 32, UCMJ, [10 U.S.C. § 832, (1982)] pretrial investigation if you so request.
>
> If you are represented by civilian counsel, he must be provided by you at your own expense and at no expense to the United States Government.
>
> If you desire military counsel of your own selection and that counsel is reasonably available, that counsel will be provided for you free of charge.
>
> If you are not represented by civilian or individual military counsel of your own selection, a military lawyer certified in accordance with Article 27(b), UCMJ [10 U.S.C. § 827(b) (1982)] will be detailed to represent you at the investigation.

(R. 20). On December 19, 1980, petitioner's military commander asked a psychiatrist to examine him to determine his mental responsibility and his competence to stand trial.[4]

Dr. Karols, a forensic psychiatrist, examined petitioner in the brig at Harold E. Holt. In a letter dated December 21, 1980, he informed petitioner's commanding officer that petitioner did suffer from a mental disease and did understand the nature of the proceedings, but was incapable of conducting his defense or cooperating intelligently in his defense. (AE VII, enclosure 11.) Dr. Karols diagnosed petitioner as

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[4] Paragraph 121 of the *Manual for Courts-Martial, 1969 (Rev.)* allowed any number of interested parties to cause an inquiry into the sanity of an accused at different stages of the criminal process. A "board" to conduct such an inquiry must contain at least one physician, and at least one member "should be" a psychiatrist. The board had to make "separate and distinct findings" to each of the following questions:

> At the time of the alleged criminal conduct did the accused have a mental disease or defect? The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> What is the clinical psychiatric diagnosis?
>
> Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to appreciate the criminality of his conduct?
>
> Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to conform his conduct to the requirements of law?
>
> Does the accused possess sufficient mental capacity to understand nature of the proceedings against him and to conduct or cooperate intelligently in his defense?

suffering from manic-depression, and recommended four weeks of hospitalized treatment.

In his formal report of the board's findings, Dr. Karols revealed that he had examined many items, among them logs maintained by the brig guards. He reported later that petitioner "has also made numerous requests to see the Legal Officer." (AE VIII, at 4.)[5]

On December 22, 1980, petitioner was taken, under restraint, to Tripler Army Medical Center, Hawaii. He underwent psychiatric evaluation there from December 24, 1980, to January 24, 1981, with a view toward establishing his competence to stand trial. (AE VII, enclosure 17.) During that period a second sanity board convened on January 13, 1981. This board, composed of three physicians, again found petitioner to lack capacity to stand trial and to have a mental disorder. Upon petitioner's discharge from Tripler on January 24, 1981, his condition was diagnosed as unchanged, and the recommendation was for further treatment. In response to a subsequent inquiry for board results tailored to Paragraph 121 (*see supra* n.4), Tripler responded that petitioner, at the time of the alleged offenses, "did lack some substantial capacity in retaining a specific intent." (AE VII, enclosure 25.) During this period, at no time was petitioner provided counsel.[6]

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[5] The United States Navy-Marine Corps Court of Military Review found as fact that petitioner adamantly requested counsel on December 17, 1980, after his initial contrary indication. App. at 27a.

[6] In the area of Tripler Army Medical Center, Hawaii are at least three military installations where no fewer than 30 judge

On January 24, 1981, petitioner was medically evacuated, again under restraint and with guard escorts, to National Naval Medical Center, Bethesda, Maryland. During the period from January 26, 1981, to March 10, 1981, while petitioner underwent psychiatric treatment and evaluation, he was not free to leave the ward. (R. 28.) Still he saw no counsel.[7] Upon petitioner's discharge on March 10, 1981, the treating physician found him competent to stand trial but recommended that he be administratively separated from the service as "unsuitable."[8] *Id.* That day petitioner was transferred from the National Naval Medical Center to the brig at Marine Corps Development and Education Command, Quantico, Virginia. On March 26, 1981, petitioner consulted for the first time with his appointed defense counsel, assigned from the Naval Legal Service Office, Guam.

Petitioner was tried by a general court-martial which convened on September 16, 1981, on Guam. At trial petitioner presented a defense of lack of or diminished mental capacity, presenting some evidence from the Tripler sanity board of January 13 as well as extensive family and childhood history. Petitioner

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advocates were stationed: The Naval Legal Service Office, Pearl Harbor, Hawaii; Marine Corps Air Station, Kaneohe Bay, Hawaii, and Fort Shaffter, Hawaii.

[7] The Washington, D.C., metropolitan area, where the National Naval Medical Center is located, has the highest density of judge advocates of any metropolitan area in the United States.

[8] Administrative discharge for his medical condition is among the options available to the military commander, as are dismissal of the charges, suspension of the proceedings, and referral to court-martial, based on the results of the sanity board. *Manual for Courts-Martial, 1969 (Rev.)*, para. 121. *See supra* n.4.

called Dr. Terry Chamberlain, a member of the sanity board that evaluated him at Tripler Army Medical Center, who testified to his opinion that at the time of the alleged offenses, petitioner lacked the substantial capacity to conform his conduct to the requirements of the law. (R. 152-176; R. 162.)

The Government rebutted by calling two of the other physicians who had examined petitioner at the command-ordered sanity inquiries in Australia. In surrebuttal, petitioner then offered through a stipulation the testimony of Dr. Delano Collins, also a psychiatrist and a member of the Tripler sanity board, whose opinion was that petitioner "lacked substantial capacity to appreciate the criminality of his conduct at the time of the alleged offense and also lacked substantial capacity to conform his conduct to the requirements of the law. He lacked the ability to form a specific intent to commit a crime." (Defense Exhibit G; R. 242.) Nonetheless, he was convicted of housebreaking, assault with intent to commit rape, and assault with a means likely to produce grievous bodily harm, in violation of Articles 130 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 930 and 934, respectively. The court sentenced him to confinement for 5 years, to forfeiture of all pay and allowances, to reduction to the lowest enlisted pay grade, and to a bad-conduct discharge.[9]

The Federal constitutional question was litigated at trial by a motion to dismiss the charges for denial of

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[9] The court had been properly convened by an officer exercising general court-martial jurisdiction over petitioner. Article 22, UCMJ, 10 U.S.C. § 822 (1982). The charges were properly referred to this court-martial. Articles 32, 33, and 34, UCMJ, 10 U.S.C. §§ 832, 833, and 834 (1982).

the right to counsel, and has been continuously litigated throughout the appellate process. The issue granted by the United States Court of Military Appeals as a prerequisite to this Court's jurisdiction was:

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS COMMAND.

REASONS FOR GRANTING THE PETITION

From December 9, 1980 until March 26, 1981, petitioner was shuttled around the world, a prisoner, from one sanity board to another, completely at the mercy of the Government's might, with no advocate to assist him or to call "time out."

The United States Court of Military Appeals found that the period from December 19, 1980, to March 26, 1981, during which charges were pending against petitioner and he was held incommunicado, was a "critical stage" in the proceedings against petitioner. (App. at 9a.) The court found that although the denial of the assistance of counsel was constitutional error, the error had to be tested for prejudice under the standard enunciated in *Chapman v. California,* 386 U.S. 18 (1967). In so doing, the court broadened the reach of the "constitutional harmless error" doctrine into an area this Court has not squarely addressed. This Court has held that some constitutional errors are not amenable to tests for prejudice and in such cases, reversal is made without regard to prejudice. *See Flanagan v. United States,* 465 U.S. 259 (1984).

Moreover, where the denial of counsel continues over a three and one-half month period during which

petitioner was utterly denied counsel, the United States Court of Military Appeals erred in requiring petitioner to demonstrate prejudice. While the court paid "lip service" to the requirement of *Chapman* that the burden is on the Government to establish that the error was harmless (App. at 23a), the court, in fact, looked to petitioner to demonstrate the specific prejudice, as had the court of the first instance. App. at 11a.

I. THE DENIAL OF COUNSEL AT A CRITICAL STAGE OF EXTENDED DURATION SHOULD NOT BE TESTED FOR HARMLESS ERROR UNDER THE STANDARD OF CHAPMAN V. CALIFORNIA.

1. In *United States v. Wade*, 388 U.S. 218 (1967), this Court held that the right to the assistance of counsel guaranteed by the sixth amendment attaches before trial, at certain "critical stages." Such stages are identified by examining whether counsel is necessary to protect any meaningful rights necessary to a fair trial. *Id.* at 227.

Stages such as custodial interrogation (*Miranda v. Arizona*, 384 U.S. 436 (1966)), post-indictment lineup (*Wade*), arraignment in a capital case (*Hamilton v. Alabama*, 368 U.S. 52 (1961)), and preliminary hearings (*Coleman v. Alabama*, 399 U.S. 1 (1970) (plurality opinion)), have been held to be such critical stages. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court held that where the petitioner's fifth amendment right against self-incrimination was at stake in a psychiatric hearing, the petitioner had a right to the assistance of counsel prior to that hearing, a critical stage.

2. Although the "stages" this Court has identified have been discrete entities, this Court's approach to

the question obviously informed the court below. Judge Cox, speaking for the court, found that charges were pending against petitioner from December 19, 1980, and that the entire period from December 19, 1980, to March 26,, 1981, was a "critical stage" because of petitioner's status as a mental incompetent and because of the *potential* for prejudice to petitioner's right to a fair trial.

In doing so, the court found that the "adversary judicial proceedings" that trigger the sixth amendment's counsel protections had begun. *See Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion). Heretofore, this Court has not had occasion to examine a "critical stage" of this extended a duration, during which other constitutional protections are implicated.[10] The sanity boards before which petitioner appeared, unaided by counsel, required petitioner to give information of a "testimonial" nature, thereby implicating the protections of the fifth amendment's self-incrimination prohibition. *See Estelle v. Smith*, 451 U.S. 454, 463-465 (1981). The inquiries were held at the request of petitioner's commanding officer, with a view toward determining his competence to stand trial, as part of the prosecutorial machine that had been put in motion. For this extended critical stage,

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[10] In *United States v. Gouveia*, ___U.S. ___, 104 S.Ct. 2292 (1984), the Court overruled a Ninth Circuit decision dismissing indictments in the cases of four indigent Federal prison inmates who had been administratively segregated for an extended period of time following a murder, without appointment of counsel. This Court examined the delay for its potential for prejudice and found none of any moment. It was significant to this Court that the inmates were not questioned during the period, had access to visitors, and could have retained counsel.

which is more aptly described as a *series* of critical stages, petitioner was never once afforded even minimal contact with an individual to provide him counsel.

3. While this Court has never expressly articulated it, a common thread that runs through the critical stages this Court has identified is that they have been *discrete* and *severable*, thus amenable to analysis of their effect on other stages of a prosecution. *Wade*'s post-indictment lineup was a pre-trial event with a discernable beginning and end, with a finite group of parties involved, and likely to affect an equally finite segment of a trial—the in-court identification. To a great extent the isolated event and its impact can be quantified and its effect can be weighed against the strength of the Government's case. This Court similarly found that the state of Alabama's preliminary hearing in *Coleman v. Alabama*, 399 U.S. 1 (1970), at which the State could call witnesses and the defendant may, but need not, advance defenses, was such a stage. Denial of counsel there, too, was tested under the *Chapman* doctrine. This stage has the same features as the *Wade* line-up.

This post-indictment, State-ordered interview in *Estelle v. Smith*, *supra*, where a psychiatrist called upon the defendant to make compelled testimonial statements, was a stage requiring the guiding hand of counsel. The affirmative use by the State of the defendant's statements as evidence of future dangerousness at the sentencing phase of a capital murder trial was held to be prejudicial. If the State had made absolutely no use of the confrontation, as in *United States v. Morrison*, 449 U.S. 361 (1981), a different result would have obtained. Again, these events have

features similar to those of the line-up and the preliminary hearing: The event is discrete, and the part of the trial it affects is fairly discernable. *Chapman* presaged this interpretation when it noted the "workable" quality of the test. 386 U.S. at 24.[11]

4. Rather than distill a common theme from these cases, the United States Court of Military Appeals applied the same test for prejudice to an extended and unjustified denial of counsel that this Court applies to discrete constitutional violations, with little support from this Court's precedents.[12] It also ignores the development of a line of cases holding that some errors are either not amenable to such a test or are

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[11] The harmless error test of *Chapman* is particularly suited to errors that can be carved out of the proceeding, leaving a trial mosaic that can be scrutinized for its taint. Thus, this Court had occasion to apply it to prosecutorial comment on the right to remain silent at trial (*United States v. Hasting*, 461 U.S. 499 (1983)), to *Bruton* violations (*Brown v. Illinois*, 411 U.S. 223 (1973)), and (*Harrington v. California*, 395 U.S. 250 (1969)) and to use of a counsel-less confession (*Milton v. Wainwright*, 407 U.S. 371 (1972)). This restricted application is consistent with *Chapman*'s original rationale that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . deemed harmless." 386 U.S. at 22.

[12] This Court did not have to reach the issue of what remedy would be appropriate to such an error in *Gouveia, supra*, n.9, because of its adverse resolution of the critical stage issue. This Court has had no other opportunity to address a denial of this magnitude. Even *Chambers v. Maroney*, 399 U.S. 42, 54 (1970) where the Court declined to fashion a *per se* rule requiring reversal for "tardy" appointment of counsel, did not address a denial of counsel during periods where the accused was placed in confrontation with the State.

so inherently prejudicial that specific prejudice need not be shown.

II. THE DENIAL OF COUNSEL FOR A PERIOD OF NINETY-FIVE DAYS DURING WHICH PETITIONER WAS DECLARED MENTALLY INCOMPETENT AND TAKEN BEFORE SUCCESSIVE SANITY BOARDS IS INHERENTLY PREJUDICIAL.

1. This Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the defendant during a critical stage of the proceeding *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). Hence, this Court reversed in *Geders v. United States*, 425 U.S. 80 (1976), where the trial judge prevented the petitioner from consulting with counsel "about anything" during a 17-hour overnight recess between his direct and cross-examination. In so doing, the Court did not address the prejudice to this petitioner, but harkened back to the importance of the role of counsel first explicated in *Powell v. Alabama*, 287 U.S. 45 (1932).

Herring v. New York, 422 U.S. 853 (1975), presented the Court with a State statute that allowed the trial judge the discretion to prevent parties from presenting summation in nonjury trials. The Court analyzed the statute in terms of its derogation of the right to the assistance of counsel, adverting to the premise of our adversary system that partisan advocacy will promote its ultimate objectives. *Id.* at 862. Likewise, a denial of the right to effective cross-examination was considered constitutional error of the "first magnitude" in *Davis v. Alaska*, 415 U.S. 308, 318 (1974), as was the right to conflict-free counsel

in *Holloway v. Arkansas*, 435 U.S. 475 (1978). Reversals occurred in those cases because prejudice was presumed. *See also Flanagan v. United States*, 465 U.S. 259 (1984) (right to counsel of one's choice is such a right). In addition, the denial of constitutional rights in some circumstances is simply not "amenable to harmless error analysis," so it is not to be undertaken. *See McKaskle v. Wiggins*, 465 U.S. 168, 174, n.8 (1984) (re-affirming the *Faretta* right to self-representation.)

2. Equally compelling is the impossibility of applying a "harmless error" standard to petitioner's languishing without assistance of counsel for over three months while Government psychiatrists had continuous and unfettered access to him, and the "puissance" of the Government was fully brought to bear upon him.[13] His early request for counsel went unheeded and the Government shuttled him halfway around the world, doctor-shopping, with judge advocates often within footsteps of this lone accused. Petitioner faced the Government daily in formal and informal confrontations. Yet the United States Court of Military Appeals was able to say they found no prejudice. Searching for prejudice is impossible and should not even be attempted because the right to the assistance of counsel is so very basic in fundamental fairness.[14]

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[13] At trial, petitioner's sole defense was lack of mental responsibility. He had to rely upon the evidence obtained *from him* by the Government's psychiatrists, as he had no counsel to avail him of "neutral" psychiatrists who were not "beholden to the prosecution." *See generally Ake v. Oklahoma*, ___ U.S. ___, ___, 105 S.Ct. 1087, 1097-1098 (1985).

[14] Apparently, the only other Federal appellate court to address this kind of denial of counsel did so in *Timmons v. Peyton*,

III. THE UNITED STATES COURT OF MILITARY APPEALS INCORRECTLY APPLIED THE HARMLESS ERROR STANDARD OF CHAPMAN.

1. If the United States Court of Military Appeals was correct in attempting to apply the *Chapman* harmless error standard to the prolonged and unjustified denial of counsel at issue, it did so in a manner indicating a misunderstanding of this Court's opinions. The court correctly approached the question of whether constitutional error had occurred by examining whether substantial *potential for prejudice* inhered in that period. App. at 7a. However, it continued to look to petitioner to establish the prejudice, albeit while paying lip service to the principle that in such cases the burden is upon the Government to establish lack of prejudice. *Gilbert v. California*, 388 U.S. 263, 272 (1967). The court concluded: "Appellate defense counsel makes no specific averment of how appellant was particularly prejudiced at trial by denial of counsel during this period," and then went on to explicitly approve of the following ruling by the trial judge:

> The court initially finds that although there is in the brief and in argument some general allegations of prejudice from the failure of the Government to provide the accused with counsel while he was being treated in these various psychiatric wards, *no specific prejudice has been shown*. Accordingly, the motion to dismiss all charges and specifications

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360 F.2d 327 (4th Cir. 1966) and *Caudill v. Peyton*, 368 F.2d 563 (4th Cir. 1966) using a "critical stage" and fundamental fairness analysis to set aside the convictions.

> thereunder based on denial of counsel is denied.

App. at 11a. (emphasis added). The court's looking to petitioner to show prejudice cuts directly against *Chapman*'s own mandate for the "beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

In addition to this apparent misunderstanding of the burden in a harmless error analysis, the United States Court of Military Appeals also misreads *United States v. Morrison*, 449 U.S. 361 (1981), which it cites as support for the lack of a presumption of prejudice in sixth amendment counsel deprivations. *Morrison* does not require a showing of specific prejudice but a showing of "demonstrable prejudice or substantial *threat thereof* . . . ." *Id.* at 365 (emphasis added). Petitioner amply met that requirement.

CONCLUSION

The United States Court of Military Appeals has decided a significant constitutional question in a manner that finds little support in this Court's precedents. It has extended the doctrine of constitutional harmless error to an area that this Court has not previously sanctioned. The impact of its decision on the Constitution protections of thousands of American service-members will be enormous and adverse. For these reasons the petition should be granted.[15]

Respectively submitted,

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Advocate General's Corps
(JAGC), U.S. Navy
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Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel

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[15] Petitioner asks the Court to consider summary reversal.

APPENDIX

APPENDIX A

No. 46778
NMCM 82 0461.

UNITED STATES,

Appellee,

v.

BRENT C. WATTENBARGER
Mess Management Specialist
Third Class,
U.S. NAVY,

Appellant.

U.S. Court of Military Appeals.

Nov. 18, 1985.

Accused, mess management specialist third class, E-4, United States Navy, was convicted by general court-martial of assault with intent to commit rape, assault with means likely to produce grievous bodily harm, and housebreaking, and he appealed. The United States Navy-Marine Corps Court of Military Review, Cedarburg, C.J., 15 M.J. 1069, affirmed, and appeal was taken. The United States Court of Military Appeals, Cox, J., held that counsel was not provided in timely fashion for a critical stage of proceedings; however, error was harmless.

Affirmed.

Everett, C.J., filed a concurring opinion.

For Appellant: *Lieutenant J. Cunyon Gordon, JAGC, USN* (argued); *Lieutenant Commander Jeanne Carroll, JAGC, USN, Major Patrick H. McGann, Jr., USMC, Lieu-*

tenant Mark A. Zuboff, JAGC, USNR, (on briefs); *Lieutenant Colonel M.W. Lucas, USMC* and *Captain W.J. Ciaravino, USMC.*

For Appellee: *Lieutenant Commander John B. Holt, JAGC, USN* (argued); *Captain W.J. Hughes, JAGC, USN; Lieutenant Commander W.A. Dorsey, JAGC, USNR;* and *Lieutenant Thomas J. Demay, JAGC, USNR-R.*

Opinion of the Court

COX, Judge:

Appellant was tried by a general court-martial composed of members and a military judge during September 1981 at the Naval Legal Service Office, Guam. Contrary to his pleas, he was found guilty of assault with intent to commit rape, assault with a means likely to produce grievous bodily harm, and housebreaking, in violation of Articles 134 and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 930, respectively. He was sentenced to a bad-conduct discharge, 5 years' confinement at hard labor, total forfeitures, and reduction to pay grade E-1. The convening authority approved this sentence, and the Court of Military Review affirmed. 15 M.J. 1069 (1983).

This Court granted review on the following issue:

> WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS COMMAND.

Although we find that counsel was not timely provided, we hold that appellant was not denied effective assistance of counsel at trial. Accordingly, we affirm.

Appellant asserts that he was denied effective assistance of counsel as guaranteed by both the sixth amendment of the Constitution and by military due process. *See generally United States v. Jackson,* 5 M.J. 223 (C.M.A.1978). He acknowledges that he was represented by counsel at his

court-martial and for a period of six months prior to it. Nevertheless, relying on the decisions of the Supreme Court in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), and *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), he contends that this legal right was violated when command failed to provide him counsel during an earlier 3-and-$^1/_2$-month period. Appellant argues that this period was a critical stage of the pretrial proceedings against him. He asserts that command must appoint counsel for an accused declared mentally incompetent to assist in his defense, especially when it pursues an active course of prosecution against him. *See Timmons v. Peyton*, 360 F.2d 327 (4th Cir.1966). Such a denial of counsel, he intimates, is presumptively prejudicial and requires reversal of his conviction, because the likelihood of effective representation at trial by any lawyer under these circumstances is so small. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984); *United States v. Jackson*, *supra*.

In response to these assertions, we hold: First, command authorities did not provide appellant with assistance of counsel in a timely fashion prior to his court-martial. Second, appellant was without counsel during a period in which a substantial threat existed as to his later ability to receive a fair trial, a so-called "critical stage." Third, no presumption of prejudice exists in the present case. *Cf. Powell v. Alabama*, *supra*. Last, we find beyond a reasonable doubt that there was no prejudice of any kind, transitory or permanent, resulting from this delay which impacted on the ability of counsel to adequately and effectively represent appellant at this court-martial. *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).

The facts surrounding the granted issue are numerous and are detailed in full in Appellate Exhibit VI, a stipulation of fact accepted by the parties at trial. This stipulation of fact is attached as an appendix to this opinion.

In addition, the Court of Military Review recounted the facts of this case in its opinion (15 M.J. at 1071-73) so no futher detailed narrative on our part is necessary. However, to place the granted issue in the proper perspective, a brief outline of the facts of this case is appropriate.

The offenses for which appellant was found guilty occurred on December 4, 1980. Australian authorities arrested appellant that same day and placed him in pretrial confinement until December 9, 1980. On that day, Australian authorities waived jurisdiction and surrendered him to American military authorities at the U.S. Naval Communication Station, Harold E. Holt. Command authorities placed appellant in pretrial confinement where he remained until December 22, 1980. The local command ordered a sanity board examination of appellant on December 19, 1980. A report was issued on December 21, 1980, which concluded that appellant was then mentally incompetent to cooperate with defense counsel and recommended psychiatric treatment. Appellant was medevaced to Tripler Army Hospital, Hawaii, on December 23, 1980. A second sanity board examination was held on January 13, 1981, and it found appellant mentally incompetent to stand trial and at the time of the offense. It recommended further psychiatric treatment, and appellant was transported on January 25, 1981, to the National Naval Medical Center in Bethesda, Maryland. On March 10, 1981, a third sanity board was conducted and found appellant competent to stand trial. He was then confined at the Marine Corps Brig at Quantico, Virginia, and later transported to Guam, the situs of his trial.

Appellant first consulted with counsel on March 26, 1981, and he was released from pretrial confinement on that day. After two more command-ordered sanity examinations, appellant was brought to trial before the members on September 21, 1981.

I. Was counsel provided in a timely fashion?

The first question we address is when did appellant's right to counsel under the sixth amendment attach. *See Estelle v. Smith*, 451 U.S. 454, 470, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981). This constitutional right to counsel does not attach until "at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 688, 689, 92 S.Ct. 1877, 1881, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion), cited with approval in *Estelle v. Smith, supra*, 451 U.S. at 469, 470, 101 S.Ct. at 1876, 1877.[1] In the military, this sixth-amendment right to counsel does not attach until preferral of charges. *See United States v. Adams*, 21 U.S.C.M.A. 401, 405, 45 C.M.R. 175, 179 (1972); *United States v. Moore*, 4 U.S.C.M.A. 482, 486, 16 C.M.R. 56, 60 (1954).

The problem raised in the present case is that the charge sheet included in the record of trial states that the charges of which appellant was convicted were not preferred until March 12, 1981. The critical period for which appellant asserts he was denied sixth-amendment counsel was substantially concluded by that time. Relying on *United States v. Wade, supra*, 388 U.S., at 226, 227, 87 S.Ct. at 1931, 1932, he nonetheless assumes this particular constitutional right is implicated at any critical stage prior to trial. This assumption is highly questionable in view of the Supreme Court opinions in *Kirby v. Illinois, supra*, 406 U.S., at

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[1] Prior to initiation of adversary judicial proceedings, appellant may have also had a constitutional right to counsel under the due process clause of the fifth amendment (*see Kirby v. Illinois*, 406 U.S. 682, 690, 691, 92 S.Ct. 1877, 1882, 1883, 32 L.Ed.2d 411 (1972) (plurality opinion)), or as a safeguard for his fifth-amendment *Miranda* rights. *See Estelle v. Smith*, 451 U.S. 454, 470 n. 14, 101 S.Ct. 1866, 1877, n. 14, 68 L.Ed.2d 359 (1981). These questions are neither raised nor addressed in the briefs and do not affect our judgment in this case.

690, 691, 92 S.Ct. at 1882, 1883, and *Estelle v. Smith, supra.*

Our review of the record, however, indicates that appellant's sixth-amendment right to counsel may indeed have attached much earlier than March 12, 1981. First, military authorities induced Australian authorities to waive jurisdiction and accepted jurisdiction over these offenses on December 9, 1980. Second, appellant, after being placed in pretrial confinement by command, was advised on December 12, 1980, as to his rights at an impending Article 32, UCMJ, 10 U.S.C. § 832, investigation, including his right to counsel. Third, the command requested that lawyers from the Naval Legal Service Office in Guam be made available for this impending pretrial investigation and lawyers were made available by that office on December 13, 1980. Finally, the report of the doctor who conducted the first command-ordered mental examination of appellant refers to a charge sheet dated December 19, 1980.

In this context, it is not entirely clear when charges had in fact first been preferred against appellant, a situation not confronted in earlier cited military cases. In any event, the test for sixth-amendment purposes is whether adversary judicial proceedings have been instituted against a suspect. Under the facts of this case, we are convinced that appellant's sixth-amendment right to counsel attached within the meaning of *Kirby v. Illinois* and *Estelle v. Smith*, both *supra*, on December 19, 1980, before his command-ordered mental examination.[2]

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[2] This right to counsel need not be based solely on constitutional grounds. On December 19, 1980, appellant had been in pretrial confinement for more than 48 hours and had requested a lawyer on December 16 and 17, 1980. Under Naval Service Regulations, counsel should have been made available to him within 48 hours of this request. SECNAVINST 1640.9 and JAGMAN 0151. Accordingly, as a matter of military due process, appellant was entitled to assistance of counsel. *See United States v. Jackson*, 5 M.J. 223 (C.M.A.1978). *See also United*

II. Was the period from December 19, 1980 to March 26, 1981, a "critical stage" of the proceedings?

If this period is shown to be "critical" in the sense of *Powell v. Alabama, supra,* and *Coleman v. Alabama,* 399 U.S. 1, 7-10, 90 S.Ct. 1999, 2002-2004, 26 L.Ed.2d 387 (1970) (plurality opinion), then constitutional error must be deemed to have occurred. *See United States v. Cronic, supra* at 2047 n.25. In this regard, we note that a "critical stage" for purposes of the sixth-amendment analysis depends on "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *Coleman v. Alabama, supra,* 399 U.S., at 9, 90 S.Ct. at 2003, *quoting United States v. Wade, supra,* 388 U.S., at 227, 87 S.Ct. at 1932.

Appellant concedes that his confinement or status as a prisoner-patient during the period he was denied counsel does not *per se* make it a "critical stage" of the proceedings against him. Instead, he asserts that this period became critical when the first command-ordered sanity board declared him mentally incompetent to cooperate with a defense counsel. He analogizes his status as a mental incompetent during this period to the illiterate defendant in *Powell v. Alabama, supra;* to the unadvised defendant in *United States v. Wade, supra;* and to the incommunicado defendant in *Timmons v. Peyton, supra.* He asserts that a person in such a status without counsel was "literally helpless to confront the awesome power of the Government in conducting and preparing a defense for his upcoming trial."

Appellate defense counsel has fashioned the following "nonexclusive list" of areas where appellant may have

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States v. Hayes, 19 U.S.C.M.A. 60, 41 C.M.R. 60 (1969); *United States v. Ross,* 19 U.S.C.M.A. 51, 55, 41 C.M.R. 51, 55 (1969). Appellant's earlier decision on December 12, 1980, not to see a lawyer "at this time" did not irrevocably waive his military-due-process right.

been prejudiced as a result of not being represented by counsel during this period:

(1) Demands For Speedy Trial

(2) Demands For Defense Requested Sanity Boards/Private Psychological Evaluations At Or Near The Time Of The Offenses

(3) Opportunities of Appellant To Discuss The Case With Counsel While His Memory Of Recent Events was Still Fresh

(4) Advice Of Counsel To Appellant Regarding His Rights Under Article 31, UCMJ, [10 U.S.C. § 831,] Especially In Light Of Continuous Conversations With Hospital and Medical Personnel Regarding The Incident Which Are *Not Privileged* Communications And Admissible At Trial.

(5) Opportunities For Defense Counsel To Query Members Of The Sanity Board, Just Prior To Or Subsequent To Their Findings In The Hopes Of Obtaining Statements Which Could Be Used As Subsequent Impeachment At Trial 8-9 Months Down The Road.

(6) Conversations With The Convincing Authority and Trial Counsel Regarding Appropriate Disposition of Charges, *i.e.*, Medical Discharge.

(7) Conversation With Australian Authorities To Alleviate Pressures Upon American Military Authorities To Bring An Incompetent Accused To Trial At *All* Costs.

(8) Representation at the Pretrial Identification Lineup.

(9) Disadvantages Suffered With Regards To Compilation of Evidence And Witness Interviews.

It is on this basis that he contends that this period was a "critical stage" of the proceedings for appellant.

In *Powell v. Alabama, supra*, 287 U.S., at 58, 53 S.Ct. at 60, the Supreme Court found that the illiterate defendants were provided no substantial assistance by counsel prior to trial. It presumed potential and actual prejudice in this situation without regard to counsel's performance at trial. *See United States v. Cronic, supra.* In appellant's case and in *Timmons v. Peyton, supra*, the denial of counsel prior to trial was not complete. In this situation, the proper approach is to determine whether this period of the pretrial proceedings could have materially affected his right to a fair trial. *See Coleman v. Alabama, supra*, 399 U.S., at 7, 90 S.Ct. at 2002.

We note that several matters urged by the defense as establishing potential prejudice clearly are unrelated to the period of time at issue in appellant's case. For example, Australian authorities had already conducted the pretrial line-up and surrendered jurisdiction over these offenses prior to attachment of appellant's sixth-amendment right to counsel. Accordingly, factors (7) and (8) do not show potential prejudice from untimely appointment of counsel in the present case. Also, the trial judge and the Court of Military Review both denied a speedy-trial motion without regard to the absence of demands for a speedy trial.

The remaining factors listed by appellate defense counsel and appellant's status as a mental incompetent during this period tend to support his assertion that this was a "critical stage" of the proceedings for sixth-amendment counsel purposes. *See Estelle v. Smith, supra*, 451 U.S., at 470-71, 101 S.Ct. at 1876-77; *Coleman v. Alabama, supra*, 399 U.S., at 7-10, 90 S.Ct. at 2002-2004. An argument similar to the Government's—that there was no substantial potential prejudice to appellant's rights during this period because of the exclusionary privilege of Mil.R.Evid. 302 and other confidentiality provisions of paragraph 121, Manual for Courts-Martial, United States, 1969 (Revised edition)—was rejected in *Coleman v. Alabama, supra.* Accordingly, for purposes of this appeal, we hold this was a

"critical stage" of the proceedings against appellant during which he was denied sixth-amendment counsel.[3]

III. Was appellant prejudiced by the denial of counsel?

The denial of sixth-amendment counsel at a "critical stage" of the proceedings is constitutional error. *See United States v. Cronic, supra* at 2047 n.25. Such error, however, does not *per se* dictate that appellant's conviction be reversed. *Coleman v. Alabama, supra*, 399 U.S. at 11, 90 S.Ct. at 2004; *see generally United States v. Hasting*, 461 U.S. 499, 507-12, 103 S.Ct. 1974, 1979-82, 76 L.Ed.2d 96 (1983). We must decide whether denial of counsel during this three-month period prior to trial was harmless error under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[4]

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[3] Appellant does not assert that a command-ordered sanity board on the question of his mental responsibility at the time of the offense is *per se* a "critical stage" of the proceedings against him. *Cf. United States v. Hayes* and *United States v. Ross*, both *supra; but see Spivey v. Zant*, 661 F.2d 464 (5th Cir.1981), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). Instead, he avers that the results of two of these boards established that he was not mentally competent to cooperate in his defense, and this required appointment of counsel during this period to protect his right to a fair trial. *See Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Such an argument is somewhat similar to that in *Timmons v. Peyton*, 360 F.2d 327 (4th Cir.1966), where a "critical stage" of the proceedings was found where a defendant was held incommunicado for three and a half months after an offense in a mental institution at government request.

[4] Neither *Estelle v. Smith* nor *Timmons v. Peyton*, both *supra*, can be reasonably construed to require reversal for all sixth-amendment counsel deprivations. *See United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). In *Estelle v. Smith, supra*, the Supreme Court not only found potential prejudice (*id.* at 471-72, 101 S.Ct. at 1877-78) but actual prejudice as well (*id.* at 467, 101 S.Ct. at 1875). In *Timmons v. Peyton, supra*, the court of appeals did not expressly address the issue of potential prejudice but did find actual prejudice in that case.

As noted earlier, this case can be distinguished from *Powell v. Alabama, supra*, in at least one important respect. In *Powell*, the Supreme Court found that those defendants were substantially provided no legal assistance prior to trail and no opportunity to prepare their defense. In appellant's case, he was provided counsel on March 18, 1981, and this counsel had approximately six months to prepare for trial which occurred in September 1981. In view of these circumstances, we do not believe that the likelihood of effective assistance of counsel at trial is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *United States v. Cronic, supra* at 2047. Accordingly, we reject appellate defense counsel's bald assertion that the failure to appoint counsel during this period was "surely" prejudicial. *See Siverson v. O'Leary*, 764 F.2d 1208, 1217 n. 6 (7th Cir.1985).

Appellate defense counsel makes no specific averment of how appellant was particularly prejudiced at trial by denial of counsel during this period. Although the burden is on the Government to show that this constitutional error was harmless beyond a reasonable doubt (*see United States v. Hasting, supra*), no presumption of prejudice, as indicated above, exists in this case. Prior to the court-martial, trial defense counsel addressed this issue but spoke in general terms. The military judge in denying appellant's motion to dismiss commented on the absence of specific prejudice in this case as follows:

> MJ: The court initially finds that although there is in the brief and in argument some general allegations of prejudice from the failure of the Government to provide the accused with counsel while he was being treated in these various psychiatric wards, no specific prejudice has been shown. Accordingly, the motion to dismiss all charges and specifications thereunder based on denial of counsel is denied.

We agree. *United States v. Morrison, supra.*

The first point which is clear from the record is that the prosecution did not exploit the period from December 19, 1980, to March 26, 1981, to develop its case on the merits against appellant. *Cf. Timmons v. Peyton, supra.* The prosecution's case at trial was based on the testimony of witnesses and physical evidence discovered by Australian authorities while they maintained jurisdiction over these offenses. The line-up conducted by Australian authorities as part of their investigation took place the day after the offense. Military authorities did take statements from these witnesses, but this occurred after the military received jurisdiction and prior to December 19, 1980, when appellant's right to counsel under the sixth-amendment attached. Based on such evidence the Government's case was overwhelming and was not substantially enhanced by any evidence gathered by the prosecution during the period he was without counsel.

The second point which is also clear from the record is that the defense suffered no disadvantages in preparing its case on the merits. *Cf. Timmons v. Peyton, supra.* Defense counsel had unrestricted access after March 26, 1981, to the witnesses and physical evidence gathered by Australian authorities. It also had access to the statements made by these witnesses shortly after the offense and recorded in written form by American military authorities. The physical evidence relevant to this case was also substantially preserved by these authorities and was made available to the defense. Finally, there is no indication in the record that appellant forfeited any legal rights during this period without sixth-amendment counsel which impacted on his trial on the merits. The inability of the defense to challenge the Government's case on the merits against him did not stem from the failure of command to appoint counsel in a timely fashion.

The third point, again clear from the record of trial is that appellant was not prejudiced by this period without counsel in raising his insanity defense. *Cf. Timmons v. Peyton, supra.* In fact, the defense at trial relied in part on a report from the second sanity board conducted during this period to raise a reasonable doubt as to his sanity at the time of the offense. *See Ake v. Oklahoma*, __U.S.__, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985). Although the Government relied on the report of the first sanity board to rebut this defense, it only did so after appellant with advice of counsel utilized at trial expert psychiatric testimony in his behalf. *Cf. Spivey v. Zant*, 661 F 2d 464, 475 n. 18, 477 (5th Cir.1981). In this context, appellant cannot be said to have forfeited any legal rights during this period which affected his insanity defense.[5] *See Cape v. Francis*, 741 F.2d 1287, 1295-96 n. 9 (11th Cir.1984). Moreover, we have examined the defense's cross examination of the psychiatrist who conducted this first board and find it satisfactory. *See United States v. Hayes*, 19 U.S.C.M.A. 60, 41 C.M.R. 60 (1969), and *United States v. Ross*, 19 U.S.C.M.A. 51, 41 C.M.R. 51 (1969). *Cf. Timmons v. Peyton, supra* at 331-32.

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[5] No argument was made in this case that counsel could have advised appellant that he need not cooperate with these sanity boards in determining his mental responsibility at the time of the offense. *See Estelle v. Smith, supra*, 451 U.S., at 468, 101 S.Ct. at 1875. Moreover, no objection was raised at trial that the results of these examinations were inadmissible on the question of his mental responsibility at the time of the offense on the basis of Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831, and the fifth-amendment safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See Spivey v. Zant, supra* at 475 n. 18. Appellant, with assistance of counsel, elected at trial to raise the defense of insanity utilizing in part expert psychiatric testimony. *Cf. Estelle v. Smith, supra*, 451 U.S., at 466-67, 101 S.Ct. at 1874-75; *see United States v. Wilson*, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969). It was this decision, not his earlier one to cooperate with these boards, which permitted the rebuttal testimony of the first sanity board to be admitted.

We therefore find beyond any reasonable doubt that the denial of counsel during the period of December 19, 1980, to March 26, 1981, was harmless error.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

APPENDIX

APPELLATE EXHIBIT VI
GENERAL COURT-MARTIAL
UNITED STATES NAVY
WESTPAC SOUTH JUDICIAL CIRCUIT

UNITED STATES
v.

WATTENBARGER, BRENT C.
Mess Management Specialist
Third Class
United States Navy

STIPULATION OF FACTS

It is hereby agreed by and between the Government and Defense with the express consent of the accused that the following Chronology of Facts is true.

CHRONOLOGY

DATE	EVENT	ENCL
4 December 1980	Alleged Commission of Offenses by accused	(1)
4-9 December 1980	Pretrial confinement, Exmouth Police Station	(2)
4-9 December 1980	U.S. Navy and Australian Government Discuss primary jurisdiction under SOFA	(3)
6 December 1980	Initial Recommendations for Psychiatric Evaluation of accused, from NLSO Pearl Harbor	(4)

8 December 1980	Initial Request for Trial Team, and Psychiatric Evaluation of accused by Harold E. Holt	(5)
9 December 1980	Australian authorities waive jurisdiction. Accused returned to Harold E. Holt.	
9-22 December 1980	Accused held in Pretrial Confinement Harold E. Holt	
9 December 1980	Request for appointment of non-lawyer. Military Magistrate from Harold E. Holt	(6)
9 December 1980	Military Magistrate Request approved by Commander Naval Forces Marianas	(7)
10 December 1980	Waiver of non-lawyer qualifications granted by Navy Jag Washington	(8)
10 December - 26 March 1981	No magistrates hearing conducted	
12 December 1980	Accused advised by SJA Harold E. Holt of rights to counsel. NLSO Pearl Harbor informed.	(9)
13 December 1980	NLSO Pearl Harbor tentatively details Investigating Officer/ Detailed Defense Counsel to commence pretrial investigation of accused for week beginning 5 January 1981	(10)

19-21 December 1980	CDR Kenneth KAROLS, MC, NAS Barbers Point, a Board certified Psychiatrist, observes accused at Harold E. Holt and concludes accused is presently incapable of conducting his defense or cooperating with counsel in preparation of his defense. CDR Carols recommends four weeks psychiatric treatment of accused.	(11)
23 December 1980	Accused medevaced to Tripler Army Hospital	
24 December - 24 January 1981	Accused evaluated and observed at Tripler Army Hospital Psychiatric Ward	(12)
13 January 1981	Sanity Board Conducted at Tripler determines accused incompetent to stand trial.	
25 January 1981	Accused medevaced to Bethesda NMC for continued psychiatric treatment.	
25 January - 10 March 1981	Accused evaluated and observed at Bethesda NMC	(13)
10 March 1981	Bethesda NMC determines member competent to stand trial	(14)

10-26 March 1981	Accused transferred to Quantico, Virginia Brig to await determination of where to transfer to stand trial	
12 March 1981	Request from Harold E. Holt for trial team from NLSO Guam	(15)
12 March 1981	Charges preferred.	
13 March 1981	Commander Naval Forces Marianas approves conducting of Article 32 Investigation at NLSO Guam	(16)
17 March 1981	Harold E. Holt requests military escorts for accused for transfer from Quantico to Guam	(17)
19 March 1981	Records and reports, service record book, of accused, transferred by registered mail from Harold E. Holt to Guam	
18 March 1981	LT D. L. Anderson, JAGC, USNR, NLSO Guam made available to represent the accused, LT J. Carver, detailed as Gov't Counsel	(18)
19 March 1981	Military escorts made available to transfer accused to Guam	(19)
26 March 1981 -		

Present	Accused arrives NAVSTA Guam, restriction to limits of NAVSTA	
31 March 1981	Harold E. Holt Appoints investigating officer, and Government counsel for Article 32 investigation.	(20)
30 March 1981	Detailed Defense, request to travel to Harold E. Holt to interview witnesses	(21)
31 March 1981	Request is approved.	(22)
31 March - 3 April 1981	Detailed Defense TAD Subic Bay, Philippines	
4-13 April 1981	Detailed Defense on leave Philippines	
20 April - 1 May 1981	Detailed Defense in transit to Australia	
1-5 May 1981	Detailed Defense Counsel conducts investigation Harold E. Holt	
5-7 May 1981	Detailed Defense Counsel in transit to Guam	
8-17 May 1981	Investigating Officer TAD to Subic Bay	
15 May 1981	LT L. Groce appointed Government Counsel due to LT Carver transfer to SJA billet Harold E. Holt. LT Carver relieved as TC.	(23)

20 May 1981	First session of Article 32 preliminary investigation convened.	
20 May 1981	Government counsel requests of Bethesda NMC, Tripler AMC answers to sanity issues not previously supplied.	(24)
3 June 1981	Tripler responds.	(25)
4 June 1981	Bethesda responds	(26)
4 June 1981	At request of Commanding Officer, Harold E. Holt, CDR Eugene Tinelli, NRMC Guam holds psychiatric evaluation of accused. Although requested to answer all Fredricks questions by Government counsel, due to psychoanalytic school of thought practiced by CDR Tinelli, he is unable to opine on grounds other than present competency of accused.	(27)
5 June 1981	Government counsel receives results of Psychiatric Evaluation	
8-9 June 1981	Article 32 Investigation conducted	
10 June 1981	Investigating officer completes Article 32 Investigation Report.	

15 June 1981	Report of Investigation received by Commanding Officer, Harold E. Holt
6 July 1981	Commanding Officer forwards report of investigation to Commander Naval Forces Marianas
15 July 1981	Report of investigation and forwarding Endorsement received by Commander Naval Forces Marianas
22 July 1981	Staff Judge Advocate completes Article 34 advice
22 July 1981	Commander Naval Forces Marianas approves
23 July 1981	Government counsel advises SJA, Commander Naval Forces Marianas as to inconsistencies in two medical boards as to sanity of accused at time of offense. SJA directs Government Counsel to make inquiry as to closest facility to conduct psychiatric evaluation (due to problem previously stated on 4 June 1981)
23-27 July 1981	Government counsel makes telephone inquiries at Clark AFB Philippines and NRMC Pearl Harbor and informs SJA of delay which would result

25 July 1981	Charges referred.	
29 July 1981	Commander Naval Forces Marianas request Commanding Officer NRMC Guam to conduct formal 121 sanity board	
19 August 1981	Sanity Board conducted	
24 August 1981	Results of Sanity Board prepared and forwarded to Commander Naval Forces Marianas	(28)
28 August 1981	Results of Sanity Board forwarded to Government Counsel with direction by Commander Naval Forces Marianas to proceed to trial without further delay.	
28 August 1981	First available date for defense requested psychiatric witness COL. Chamberlain, MC and government witness LCDR Smyer, MC determined to be 20 September 1981.	
4 September 1981	Arrangements for all witnesses prepared by SJA	
11 September 1981	Government Counsel requests to procede through arraignment on 15 September 1981	AE III
14 September 1981	General Court-Martial Judge arrives to Guam	
15 September 1981	Detailed Defense files speedy trial motion	AE I

16 September 1981	Motion to dismiss filed with Court Initial Article 39A ICO accused held, accused proceeds through arraignment.

LAURA S. GROCE LT, JAGC, USNR Government Counsel	DONALD L. ANDERSON LT, JAGC, USNR Defense Counsel

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BRENT C. WATTENBARGER, MS3, USN
Accused

EVERETT, Chief Judge (concurring):

Not every pretrial denial of counsel at a "critical stage" requires dismissal of charges or reversal of a conviction. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). However, the Government must establish that this constitutional error was harmless. *Gilbert v. California*, 388 U.S. 263, 272, 87 S.Ct. 1951, 1956, 18 L.Ed.2d 1178, 1186 (1967); *cf. United States v. Remai*, 19 M.J. 229 (C.M.A.1985). On the basis of my examination of this record, I agree with the principal opinion's conclusion that here the Government has carried its heavy burden and has demonstrated that appellant's defense was not impaired by the delay in appointing counsel to represent him.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW BEFORE

O. L. CEDARBURG	MATTHEW GORMLEY III J.	A. F. MIELCZARSKI

UNITED STATES
v.

BRENT C. WATTENBARGER, 489 66 1073, Mess Management Specialist Third Class
(E-4), U.S. Navy

PUBLISH

NMCM 82 0461 DECIDED 26 April 1983
Sentence adjudged 23 September 1981 Review pursuant to Article 66(c), UCMJ of General Court-Martial convened by Commander U.S. Naval Forces Marianas/Commander U.S. Naval Base Guam, Guam, Marianas Islands

CDR Matthew J. Wheeler, JAGC, USNR, Appellate Defense Counsel
CAPT W. J. Ciaravino, USMC, Appellate Defense Counsel
LCDR W. A. Dorsey, JAGC, USNR, Appellate Government Counsel

CEDARBURG, Chief Judge:

At his general court-martial before members, appellant was convicted of assault with intent to commit rape, assault with a means likely to produce grievous bodily harm, and housebreaking in violation of Articles 134, 128, and 130, Uniform Code of Military Justice (UCMJ), respec-

tively. The members sentenced appellant to a reduction to pay grade E-1, total forfeiture of pay and allowances, confinement at hard labor for 5 years, and a bad conduct discharge. Of eleven assignments of error raised on review, we believe that five warrant discussion (I, II, IV, VII and IX). A recitation of the facts of the case is necessary.

On 3 December 1980 Mrs. P, a Navy dependent, was alone in her apartment in base housing located approximately five miles from the U.S. Naval Communication Station, Harold E. Holt, Western Australia. Around 2230 that evening her dog growled at something outside of the rear sliding glass doors of the apartment. Seeing no one outside, Mrs. P decided to go to bed. At 0030, 4 December, Mrs. P was awakened by her dog's barking and a constant knocking at her front door. Clad in a floor length robe she went to the door, turned on the porch light, and asked who was there. She thought she heard the person respond "security," so she opened the door to find appellant, whom she recognized as one of the galley workers on base, standing in the doorway with a knife. Mrs. P detected the slight odor of alcohol and noticed appellant look over his shoulder as if someone were chasing him. Appellant then grabbed Mrs. P around the shoulders and put the knife to her neck, prompting her to scream. Telling her to "shut up," appellant threw Mrs. P to the floor, began to choke her and, straddling her, warned in a very loud, harsh whisper that if she ever told a soul about this, he would kill her. Appellant stopped strangling Mrs. P to ask where her husband was, and when she responded that her husband was on duty, he ripped her robe open, began to strangle her again and said "if you understand, you kick your feet." Mrs. P kicked her feet, and appellant said, "Get your clothes off and turn off that light." Appellant got up and headed for the light switch, at which time Mrs. P jumped and ran out the door to a neighbor's house across the street. Appellant chased her briefly before re-

turning to the apartment where Mrs. P noticed her porch light go off and on.

Later that morning appellant was brought into the Exmouth Police Station because he fit the description given by Mrs. P of her assailant. He immediately identified a pair of boots which had been found outside the sliding glass door of Mrs. P's apartment as his own. In response to questions by Sergeant Roy Harper of the Exmouth Police Department, appellant stated that he remembered nothing that happened the previous night. He then remembered going to a local inn at 8:00 p.m. and leaving about 11:22, but stated that he could not remember anything after leaving the inn. Informed of a report from base security that appellant had tried to place an overseas phone call to his mother around midnight, appellant explained that he recalled trying to place the call and reaching a wrong number. In response to Sergeant Harper's further questions, appellant stated that he remembered having three or four beers at the inn and was feeling "a little bit drunk" when he left.

Appellant was arrested by the Australian authorities that morning and placed in confinement at the Exmouth Police Station until 9 December. Sergeant Harper testified that during this period, appellant's behavior seemed normal except for one afternoon during the 110°F heat when appellant appeared to be in a semi-catatonic state, refusing to drink, converse, or display any emotion. Sergeant Harper carried him into the air-conditioned station where he tried to get appellant to drink some water. Lieutenant Commander Theodore F. Smyer, Medical Corps, U.S. Navy, and Commander C. Dudley Saul, Medical Corps, U.S. Navy, were called to examine appellant. Dr. Smyer, who had interviewed and examined appellant a couple of weeks prior to the assault, testified that while he was taking appellant's pulse, appellant stuck his thumb up and gave Dr. Smyer a big wink. Within a couple of minutes, appellant

was feeling okay, leading Dr. Smyer to believe that appellant had been malingering.

Appellant was transferred to the base security department at Harold E. Holt where he was confined from 9-22 December. On 12 December, the station judge advocate advised appellant of his rights to counsel at an Article 32, UCMJ, investigation. On the rights to counsel form used by the station judge advocate, appellant wrote "I desire no cousel [sic] at this time. BCW." Appellant, subsequently requested to consult with counsel and, on 17 December, refused to clean his cell until his request was granted. On 19 December Commander Kenneth Karols, Medical Corps, U.S. Navy, conducted an examination of appellant pursuant to paragraph 121, *Manual for Courts-Martial, 1969 (Rev.)*. Dr. Karols concluded that appellant was incompetent to stand trial. diagnosing him as having a manic-depressive illness in the manic phase, severe but not psychotic, and recommended four weeks of psychiatric treatment. Dr. Karols' diagnosis was based on his extensive examinations of appellant, as well as interviews with Mrs. P and each person who had observed appellant's behavior during the evening preceding and the morning following the assault. He had also consulted Dr. Smyer and Dr. Saul about their examinations of appellant and interviewed Lieutenant Commander Gary J. Cragun, Chaplain Corps, U.S. Navy, whose counseling of appellant led to his suspicion of a mental disorder and precipitated the referral of appellant to Dr. Saul and Dr. Smyer a couple of weeks prior to the assault.

On 22 December appellant was transferred to Tripler Army Medical Center, Hawaii, where he underwent psychiatric observation until 24 January 1981. A second 121 board was held on 13 January which concurred with the diagnosis of Dr. Karols, resulting in the recommendation that appellant be transferred for further psychiatric treatment. From 25 January to 10 March, appellant underwent psychiatric evaluation at National Naval Medical Center,

Bethesda, Maryland. On 10 March a third 121 board found appellant competent to stand trial, so he was transferred to the Marine Corps Brig, Quantico, Virginia, and then to Guam, the situs of trial. Appellant first consulted with counsel in Guam on 26 March, at which time he was released from confinement and placed in a restricted status. An Article 32, UCMJ, investigation was initiated on 20 May, concluding on 9 June; trial was commenced 16 September, ending 23 September.

At trial the defense offered extensive evidence demonstrating a history of mental disorder in appellant's family and documenting repeated psychiatric counseling and institutionalization of appellant as a youth. The defense also called several witnesses and offered several stipulations of testimony which clearly showed that appellant had a very troubled, unstable childhood characterized by repeated psychiatric counseling, unusual behavior, and grandiose ideations. The defense called Colonel T.J. Chamberlain, Medical Corps, U.S. Army, an extensively qualified, experienced psychiatrist who sat on the three-member 121 board which examined appellant in late January 1981 at Tripler Army Medical Center. Based on psychiatric testing of appellant, review of his family history, and close observation of appellant for approximately 20 days while at Tripler, but without the benefit of any of the statements from the people who observed appellant's behavior on or around 4 December, the board unanimously concluded that appellant suffered from a chronic, moderate manic-depressive affective disorder. The board also unanimously concluded that at the time of the offense appellant was intoxicated on alcohol, lacked the substantial capacity to appreciate the criminality of his conduct, lacked the substantial capacity to conform his conduct to the requirements of the law, and lacked the capacity to form a specific intent. These opinions were based on the legal test for insanity adopted in *United States v. Frederick*, 3 MJ 230 (CMA 1977). The defense also introduced the results

of a three-member 121 board held on 19 August at Naval Regional Medical Center, Guam. That board found that appellant suffered from an alcohol induced organic mental disorder at the time of the offense but was inconclusive as to any clinical diagnosis or as to appellant's mental responsibility at the time of the offense.

In rebuttal the Government called Dr. Karols and offered the report of his psychiatric evaluation of appellant in late December, 1980. Dr. Karols, also an eminently qualified and experienced psychiatrist, agreed with the diagnosis of Dr. Chamberlain that appellant suffered from a manic-depressive mental disorder. However, from his consultations with Chaplain Cragun, Dr. Saul, and Dr. Smyer, and his interviews of the persons who had observed appellant on the night of the assault and during his period of confinement, Dr. Karols concluded that appellant did not lack the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law on the night of the assault. He testified further that he believed appellant did have the capacity to form a specific intent at the time of the offense.

The stipulated testimony of Electronics Technician Second Class Eric Hood indicated that he, appellant, and one other man shared 6-9 pitchers of beer between 1900 and 2230 at the Pot Shot Inn, and that when appellant left the inn, he was capable of carrying on a conversation but his speech was off. Electronics Technicial Third Class Ernest Johnson testified that he saw appellant around 2300 on 3 December when appeliant came to the guard shack on base to place an overseas call. Johnson testified that appellant talked quite a bit, at one point stating that he needed something to eat in order to sober up before calling his mother. Johnson, however, opined that appellant did not appear to have any trouble walking or talking. Johnson also testified that appellant seemed normal when he re-

turned to the base the following morning except that he was wearing no shoes.

I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

II. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

A delay in providing an accused legal representation violates that accused's rights to counsel under the Sixth Amendment to the United States Constitution if he was denied counsel at any "critical stage" of the proceedings against him. *United States v. Wade*, 388 U.S. 218 (1967); *United States v. Adams*, 21 USCMA 401, 45 CMR 175 (1972). Even where no critical stage arises, an accused's rights to counsel may be violated if the delay in providing counsel is contrary to the requirements of fundamental fairness. *United States v. Jackson*, 5 MJ 223 (CMA 1978).

In determining when a critical stage arises in the criminal prosecution of an accused, the Supreme Court has stated that:

> [T]he principle of *Powell v. Alabama* [287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1964)] and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

United States v. Wade, supra at 227. After examining the pretrial identification procedure at issue in *Wade*, the Court

held that a critical stage did arise due to the inherent risks of improper influence that exist in those procedures, the inability of an accused to recognize and correct such improprieties where they exist, and most importantly the inability of an accused to reconstruct the procedures at trial and meaningfully confront the witnesses against him. The basic concern of the Court in determining when a critical stage arises is whether the absence of counsel at that stage might derogate from the accused's right to a fair trial.

Appellant asserts that *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966), is closely on point with the case *sub judice* and requires reversal of his conviction. In *Timmons v. Peyton*, however, the appellant, having confessed to murder, was committed to a mental institution pursuant to the Government's request for a determination of his mental responsibility at the time of the offense as well as his competency to stand trial even though the former determination was not authorized by state law. Because appellant was not provided counsel for $3^1/_2$ months, the Court overturned the conviction because (1) the absence of counsel for $3^1/_2$ months hampered the accused's ability at trial to present psychiatric evidence and effectively cross-examine psychiatric witnesses against him, (2) the accused had a history of psychiatric problems and was of almost moronic mentality, and (3) the accused had the burden to prove his insanity beyond a resonable doubt. The Court considered the third factor to be the most persuasive. Unlike the accused in *Timmons v. Peyton*, appellant had no burden to prove his insanity. Furthermore we can find no indication that appellant was hampered in the presentation of his insanity defense as that issue was fully and competently litigated.

Since pretrial confinement alone does not constitute a critical stage of the accusatory process which entitles an accused to the assistance of counsel, *United States v. Jackson, supra* (accused in pretrial confinement for 42 days

before counsel appointed), and finding no substantial risk that the absence of counsel during appellant's psychiatric evaluation and treatment derogated from appellant's right to a fair trial, we conclude that no critical stage arose which entitled appellant to the appointment of counsel under the Sixth Amendment.

In determining whether a delay in the appointment of counsel violates the requirements of fundamental fairness, the most important factor to consider is whether the accused suffered any prejudice as a result of the delay. In *Jackson* the Court concluded that since the accused was charged nine days after confinement and "his somewhat ambiguous requests to consult with counsel were ultimately satisfied," *United States v. Jackson, supra* at 225, the availability of counsel was fundamentally fair. The Court, although declining to formulate a static rule for the assignment of counsel, stated that "fundamental fairness calls for such representation of all prisoners confined for more than a brief period of time." *Id.* at 227. Without further expansion on what constitutes a "brief period of time," the Court, stating that the delay of 42 days was potentially prejudicial, found in the record no indication of prejudice to the defense caused by the delay and thus refused to overturn the conviction in that case. The Court also found that the trial defense counsel had effectively waived the issue of fundamental fairness of counsel appointment by failing to raise the issue at trial when the military judge specifically questioned him regarding his preparation of the case. In *United States v. Adams, supra*, the Court of Military Appeals refused to overturn the conviction of an accused whose requests for counsel went unheeded for two months while he was in restriction, stating that "No understandable or acceptable reason has appeared for ignoring Adam's [sic] request [for counsel] at Subic Bay or Da Nang. But we are convinced that denying him consultation with counsel had no material effect upon the progress or the result of Adam's [sic] court-martial."

Contrary to the case in *United States v. Adams, supra,* where the Court found no "understandable or acceptable reason" for the delay in the appointment of counsel, the record in the present case indicates that both practical, logistical considerations and the uncertainty regarding the ultimate determination of appellant's mental state delayed the assignment of counsel to appellant. We have no doubt that an attorney probably could have been helpful to appellant and certainly comforting if appointed immediately, but we find that appellant suffered no substantial risk of prejudice as a result of the delay. Thus we conclude that appellant was not denied the effective assistance of counsel in this case.

The factors which caused the delay in the appointment of counsel are the same factors which caused the major delay in the commencement of trial. It was not until 10 March 1981 that appellant, while in National Naval Medical Center, Bethesda, Maryland, was determined to be competent to stand trial. Especially considering the logistical problems faced by the Government in holding trial in Guam, the location of the officer exercising general court-martial authority over appellant's command, a functional analysis of all of the factors involved in the delay convinces us that the Government proceeded with reasonable diligence and without deliberate oppression of the accused or lack of concern for the requirement of expeditious prosecution. *United States v. Hagler,* 7 MJ 944 (NCMR 1979) *pet. denied,* 8 MJ 172 (CMA 1979). Thus appellant was not denied a speedy trial.

IV. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT APPELLANT'S SANITY AT THE TIME OF THE OFFENSE.

Once the issue of an accused's mental responsibility is raised, the Government has the burden to prove beyond a reasonable doubt that the accused was mentally responsible at the time of the offense. *United States v. Mar-*

tinez, 12 MJ 801 (NMCMR 1981) *pet. denied*, 13 MJ 232 (CMA 1982). An accused is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *United States v. Frederick*, 3 MJ 230 (CMA 1977).

As previously noted, there was a direct conflict in the psychiatric evidence presented by the two eminently qualified psychiatrists, Dr. Karols, who examined appellant and interviewed witnesses approximately 15 days after the date of the offense, and Dr. Chamberlain, who sat on a three-member 121 board approximately 40 days after the offense. Appellant argues that the testimony of Dr. Chamberlain was sufficient to establish a reasonable doubt as to his mental responsibility and urges us to set aside the findings and sentence.

Where there is a conflict of expert testimony on the issue of sanity, and even where the defense offers uncontradicted medical testimony, it does not necessarily follow that reasonable men must entertain a reasonable doubt as to the accused's sanity. "A finding of guilty, which includes a finding of sanity contrary to expert opinion, can be sustained if it is supported by substantial evidence." *United States v. Carey*, 11 USCMA 443, 29 CMR 259 (1960). The opinions of the experts do not necessarily define the scope of the responsibility of the court-martial. The members must consider and weigh all of the evidence presented. *Id.* In analyzing the two contrary expert opinions, we examine the important factors which formed the bases of those opinions such as the professional qualifications of each expert, the duration and depth of observation and evaluation by each expert, the length of time elapsed since the offense and each examination, and the extent of other background materials and data considered. *United States v. Bush*, 14 MJ 900 (NMCMR 1982). In weighing the two expert opinions offered in the case *sub*

judice, even keeping mind that Dr. Chamberlain's board reached a unanimous conclusion, the most significant distinction is the fact that Dr. Karols relied heavily on the observations by many witnesses of appellant's behavior preceding, during, and following the night of the assault, data which was not considered by Dr. Chamberlain's board. We do not believe that Dr. Karols' lack of an extensive family history of appellant was particularly significant since both experts agreed that such data is most useful in reaching a diagnosis but not as important in reaching a conclusion about behavior at any specific time.

A number of factors in the record, particularly appellant's use of a knife, his apparent stealth and planning of the assault, his attempts to conceal his conduct, and his threats to Mrs. P convince us that appellant fully appreciated the criminality of his conduct and possessed the capacity to conform his conduct to the requirements of the law. We are satisfied that Dr. Karols' opinion, plus the other testimony presented as to appellant's behavior, constitutes substantial evidence of his sanity sufficient to convince us beyond a reasonable doubt that he was responsible for his criminal conduct.

VII. THE MILITARY JUDGE'S PRESUMPTION DURING THE FINDINGS INSTRUCTIONS THAT THE ASSAULT, AS ALLEGED IN CHARGE II, OCCURRED, DENIED APPELLANT THE PRESUMPTION OF INNOCENCE.

The military judge, during his instructions on the elements of the offenses, instructed the members to consider all relevant factors and circumstances including the testimony of Mrs. P regarding the acts and statements of the accused "during the time of the assault on her." The military judge's use of the word "assault" in that instruction is the basis for this assignment of error.

In *United States v. Gaiter*, 1 MJ 54 (CMA 1975), the Court of Military Appeals overturned a conviction based

on erroneous instructions by the military judge in which he concluded that the accused had sold drugs despite the accused's testimony to the contrary. Although there was no objection at trial, the Court refused to apply the doctrine of waiver, because the incorrect instruction was on a material issue. In the case *sub judice*, the issue of whether or not an assault occurred was essentially conceded at trial as evidenced by the reference by the trial defense counsel at least twice in his closing argument to Mrs. P's "assailant." We find no fair risk that prejudice could have resulted to appellant from the military judge's instructions. The possibility of prejudice was further diminished by the general exhortation later in the instructions that the members should disregard any comment by the military judge which would seem to express his opinion as to the guilt or innocence of the accused. *United States v. Grandy*, 11 MJ 270 (CMA 1981).

IX. THE APPELLANT WAS SEVERELY PREJUDICED BY THE INFLAMMATORY COMMENTS AND MISSTATEMENTS OF FACT AND LAW MADE BY THE TRIAL COUNSEL DURING THE FINDINGS AND SENTENCING ARGUMENTS IN A CONTESTED MEMBERS TRIAL.

In her argument on findings, the trial counsel argued that Dr. Smyer gave his opinion that appellant "knew right from wrong." She also argued at several points that appellant knew right from wrong and, at one point, apparently equated the *Frederick* and *M'Naghten* [M'Naghten's Case, 10 Cl. & F. 200, 8 Eng.Rep. 718 (H.L. 1843)] standards of mental responsibility: "nor did it render him incapable of appreciating the criminality of his conduct, in other words, appreciating wrong from right. . . ." Appellant contends that this amounted to a misstatement of law by the trail counsel. Appellant also contends that the trial counsel made a misstatement of the evidence by arguing that Dr. Chamberlain testified that the "*only* reliable di-

agnostic tool to predict whether or not at a given point in time an accused lacked substantial capacity, based on this disease, was to observe his behavior at the time" (emphasis added). Appellant contends that this combination of errors was so prejudicial that it warrants reversal of his conviction despite the absence of any objection at trial.

The trial counsel was correct in summarizing Dr. Smyer's testimony that in his opinion appellant knew right from wrong. Although this opinion may have been irrelevant, there was no objection at trial. The trial counsel did improperly equate the *Frederick* and *M'Naghten* standards of mental responsibility; however, in the absence of any objection and in light of the military judge's very clear instructions on mental responsibility, we perceive no risk that the members were persuaded to apply an improper standard. Dr. Chamberlain agreed on cross-examination that "the only really reliable way to determine whether or not a person is manic-depressive is to actually observe his behavior." Therefore the trial counsel's interpretation of Dr. Chamberlain's testimony was not so incorrect that it should be characterized as a misstatement of fact.

In her sentencing argument, the trial counsel argued strongly that general deterrence should be a factor in the members' deliberations; yet, she did not argue general deterrence to the exclusion of other factors. Considering the absence of any objection at trial and the military judge's instructions on sentencing, and comparing the adjudged sentence with the maximum authorized sentence, *United States v. Lania,* 9 MJ 100 (CMA 1980), we are convinced that the members did not give undue consideration to the theory of general deterrence in adjudging a sentence.

We find that the remaining assignments of error are without merit. Even considering the psychiatric testimony in mitigation, we further find that the sentence is appropriate in light of the egregious nature of the assault. Thus we conclude that no error materially prejudicial to the

substantial rights of appellant was committed. Accordingly we affirm the findings and sentence as approved on review below.

/s/ O. L. Cedarburg
O. L. CEDARBURG

Judge GORMLEY and Judge MIELCZARSKI concur.

/s/ Matthew J. Gormley III
MATTHEW J. GORMLEY III

/s/ A. F. Mielczarski
A. F. MIELCZARSKI

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES,

Appellee

v.

BRENT C. WATTENBARGER (489-66-1073),

Appellant

USCMA Dkt. No. 46778/NA
CMR Dkt. No. 82-0461

ORDER DENYING PETITION FOR RECONSIDERATION

On consideration of appellant's petition for reconsideration of this Court's decision, 21 M.J. 41 (1985), it is, by the Court, this 10th day of January 1986,

ORDERED:

That said Petition is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (GORDON)
Appellate Government Counsel (HOLT)

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1503

In the Supreme Court of the United States

OCTOBER TERM, 1985

BRENT C. WATTENBARGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Military Appeals correctly found that the government's failure to provide petitioner with counsel before trial was harmless beyond a reasonable doubt.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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BRENT C. WATTENBARGER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-23a) is reported at 21 M.J. 41. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 24a-38a) is reported at 15 M.J. 1069.

JURISDICTION

The judgment of the Court of Military Appeals was entered on November 18, 1985. A petition for rehearing was denied on January 10, 1986 (Pet. App. 39a). The petition for a writ of certiorari was filed on March 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was convicted by a general court-martial of assault with intent to commit rape, assault with means likely to produce grievous bodily harm, and housebreaking, in violation of Articles 134, 128, and 130 of the Uniform Code of

Military Justice (UCMJ), 10 U.S.C. 934, 928, and 930. Petitioner was sentenced to five years' imprisonment, a bad-conduct discharge, a reduction in pay grade, and forfeiture of all pay and allowances. After reviewing the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. II) 860, the convening authority approved the conviction and sentence. The Navy-Marine Corps Court of Military Review, on mandatory review of petitioner's conviction and sentence pursuant to Article 66(c), UCMJ, 10 U.S.C. 866(c), affirmed the conviction and sentence (Pet. App. 24a-38a). The Court of Military Appeals granted discretionary review, pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), to consider one claim raised by petitioner,[1] and it affirmed the judgment of the Court of Military Review (Pet. App. 1a-23a).

1. The charges stemmed from petitioner's sexual assault on a military dependent. The evidence adduced at trial, the sufficiency of which is not in dispute, is set out in the opinion of the Court of Military Review (Pet. App. 25a-26a). Briefly, it showed that shortly after midnight on December 4, 1980, petitioner entered the victim's home in military housing located near Naval Communications Station Harold E. Holt in Western Australia. Petitioner grabbed the victim around the shoulders and put a knife to her throat. After throwing her to the floor, petitioner choked her, straddled her, and said that he would kill her if she told anyone about his assault. Petitioner tore off her robe, and told her to "get her clothes off" (Tr. 80). As petitioner stood up to turn off a light, the victim ran out the door. Although petitioner chased the victim, she escaped and immediately reported the assault.

---

[1] The Court of Military Appeals agreed to review the question whether petitioner was denied the effective assistance of counsel by the delay in providing him with an appointed attorney (Pet. App. 2a).

2. Later that morning, local police officers arrested and confined petitioner. On December 9, 1980, Australian authorities waived their right to exercise jurisdiction over petitioner under the Status of Forces Agreement between Australia and the United States, and they surrendered petitioner to the American military authorities at the Naval Communications Station, where petitioner was held in pretrial confinement until December 22 (Pet. App. 4a, 15a-16a, 26a-27a.

On December 12, the command judge advocate, the only military lawyer stationed at the isolated base, met with petitioner and informed him in writing of his right to counsel (Pet. App. 16a, 27a; Tr. 20). Petitioner acknowledged that he understood his rights, and he waived his right to counsel. On the form provided to him, petitioner wrote, "I desire no cousel [*sic*] at this time. BCW." (Pet. App. 27a; App. Exh. VII, Encl. 9).[2] Despite his waiver, naval authorities in Australia asked the Commanding Officer of the Naval Legal Service Office in Pearl Harbor, Hawaii, to provide a lawyer to represent petitioner during the anticipated investigation into the incident. On December 13, the Pearl Harbor Naval Legal Service Office informed the naval authorities in Australia that Lieutenant Stephen Cochell would serve as petitioner's counsel during the pretrial investigation, which was scheduled to commence in early January 1981 (Pet. App. 16a; App. Exh. VII, Encl. 10). Before Lieutenant Cochell left for Australia, however, the local naval commander on December 19 ordered petitioner to undergo a psychiatric evaluation because of his concern for petitioner's mental condition (Pet. App. 4a, 17a, 27a). The order to evaluate petitioner made Lieutenant Cochell's trip to Australia unnecessary at that time due to delay of the pretrial investigation.

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[2] Subsequently, on December 16 and 17 petitioner withdrew his waiver and asked to speak with a lawyer (Pet. App. 6a n.2, 27a).

On December 21, the sanity board issued its report. The board found that petitioner was mentally incompetent to cooperate with defense counsel and recommended that he receive psychiatric treatment. Because the facility where petitioner was confined could not provide him with the necessary treatment (Tr. 204), petitioner was referred to the Tripler Army Medical Center in Hawaii, where the necessary psychiatric facilities were available. While he was there, petitioner was extensively tested and was placed on medication (Tr. 153-154). On January 13, 1981, a second sanity board found that petitioner was incompetent to stand trial and to assist in his defense, and it recommended further psychiatric treatment for him. Petitioner was therefore transferred on January 25 to the National Naval Medical Center in Bethesda, Maryland, for additional treatment at a psychiatric acute care facility (Tr. 163). Following six weeks of intensive treatment, a third sanity board was convened. That board found petitioner competent to stand trial. He was thereafter confined in the Marine Corps Brig at Quantico, Virginia, until he was transferred to Guam, the site of his trial. Pet. App. 4a, 16a-19a, 27a-28a.

Petitioner first consulted with his attorney on March 26, and he was released from pretrial confinement on the same day. Following two additional sanity examinations, petitioner's trial began on September 21, 1981. Pet. App. 4a, 19a-23a, 28a.

3. At trial, petitioner moved to dismiss the charges. He argued that his right to counsel and his due process rights were violated by the government's failure to honor his request for an attorney from December 19, 1980, to March 26, 1981, the period when he had been found incompetent to consult with counsel and during which he underwent psychiatric evaluation and treatment (App. Exh. II). The trial judge denied petitioner's motion, find-

ing that he had not been prejudiced by the government's failure to provide him with an attorney during that period (Tr. 28; see Pet. App. 11a).

4. The Court of Military Review also rejected petitioner's claim (Pet. App. 30a-33a). The delay in providing petitioner with an attorney was not unreasonable, the court found, because "both practical, logistical considerations and the uncertainty regarding the ultimate determination of [petitioner's] mental state delayed the assignment of counsel" (*id.* at 33a). Although the court noted that the immediate appointment of an attorney for petitioner "probably could have been helpful" for him, the court nonetheless found that petitioner "suffered no substantial risk of prejudice as a result of the delay" (*ibid.*).

5. The Court of Military Appeals affirmed (Pet. App. 1a-23a). At the outset, the court concluded that petitioner's right to counsel under the Sixth Amendment had attached on December 19, 1980, when he had been held in pretrial confinement for more than 48 hours and before he was first ordered to undergo a psychiatric examination, even though the formal charges against him were not preferred until March 12, 1981 (*id.* at 6a). The court also held that, "for purposes of this appeal" (*id.* at 9a) the period from December 19, 1980, to March 26, 1981, was a "critical stage" of the proceedings (*id.* at 9a-10a). Nonetheless, the court found that, for several reasons, the government's failure to provide petitioner with counsel during that period was harmless "beyond any reasonable doubt" (*id.* at 14a; see *id.* at 12a-13a & n.5).

The court found (Pet. App. 12a) that "the prosecution did not exploit the period from December 19, 1980, to March 26, 1981, to develop its case on the merits against [petitioner]," since the government's "overwhelming" proof was based on evidence that was acquired by the Australian authorities before the beginning of that period

and "was not substantially enhanced by any evidence gathered by the prosecution" thereafter (*ibid.*). Petitioner also suffered no disadvantages in preparing his defense, the court held, because all of the evidence acquired by the government was made available to defense counsel (*ibid.*). In addition, petitioner did not forfeit any right during the December-to-March period that could have affected his defense at trial (*ibid.*). Lastly, the court found that petitioner's ability to present an insanity defense was not prejudiced by the delay in receiving an attorney (*id.* at 13a). Petitioner relied on one of the sanity board's reports to present his defense (*ibid.*), and the prosecution did not adduce any of the board's reports to prove that petitioner was sane until petitioner had introduced psychiatric evidence in his own defense at trial (*ibid.*). The court further concluded that petitioner's lack of counsel during the investigation did not hamper him in his efforts to cross-examine the psychiatrist who had conducted the initial sanity board examination (*ibid.*).

ARGUMENT

The fact-bound decision of the Court of Military Appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

The decision below that any Sixth Amendment violation that occurred in this case was harmless is consistent with a long line of this Court's decisions.[3] Although reversal of a

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[3] In a criminal case, a defendant's Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against [him]." *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). In the military a defendant's right to counsel does not attach until the preferral of charges against him (see Pet. App. 5a). In this case, although the Court of Military Appeals found that the record was unclear as to when charges were first preferred against petitioner, the court concluded that petitioner's right to counsel attached on December 19, 1980, before he was ordered to undergo a psychiatric examination (*ibid*).

defendant's conviction is automatic if he is forced to stand trial without an attorney (*Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), slip op. 9; *Chapman* v. *California*, 386 U.S. 18, 23 n.8 (1967)), it is also settled that the failure to provide a defendant with an attorney at the pretrial stage of a criminal case can be harmless error (*Rushen* v. *Spain*, 464 U.S. 114, 117-118 n.2 (1983); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970); see also *United States* v. *Morrison*, 449 U.S. 361, 365 (1981); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Gilbert* v. *California*, 388 U.S. 263, 272, 274 (1967); *United States* v. *Wade*, 388 U.S. 218, 242 (1967); compare *White* v. *Maryland*, 373 U.S. 59, 60 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52, 54-55 (1961)). Petitioner does not challenge the concurrent findings by the three courts below that his failure to receive an attorney during the time that he underwent psychiatric observation and treatment did not prejudice his defense (see Pet. App. 11a-14a, 23a (Everett, J., concurring), 33a; Tr. 28). Those findings, in any event, do not warrant review by this Court (see, *e.g.*, *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 18 n.10; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984)). Rather, petitioner contends (Pet. 9-13) that the violation that occurred in his case should be conclusively presumed to be prejudicial because of the length of the period during which he lacked counsel. That claim, however, is without merit.

This Court's decisions have held that reversal is required in cases of this type only in limited circumstances: where the government has exploited the accused's lack of counsel to its own benefit at trial,[4] or where the defendant has

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[4] See *White* v *Maryland*, 373 U.S. at 60 (reversal required in a capital case where defendant's unaccepted guilty plea entered at his arraignment in the absence of counsel was later introduced at his trial).

forfeited a right that he could otherwise have exercised.[5] The Court has also suggested that this automatic reversal rule may be limited to capital cases. See *Holloway* v. *Arkansas*, 435 U.S. 475, 489 (1978). None of those factors is present here. Petitioner was not charged with a capital crime, and the delay in providing him with an attorney, as the Court of Military Appeals found (Pet. App. 12a), neither enhanced the government's ability to prove its case nor caused petitioner to forfeit any right.[6] Moreover, petitioner's suggested approach—which hinges on the length of time that a defendant lacks counsel, rather than on the effect that the deprivation had on his trial—would require the courts to engage in an undirected line-drawing exercise in order to decide when the harmless error doctrine suddenly becomes inapplicable and a conclusive presumption of prejudice comes into play. That approach is inconsistent with the Court's precedents and with sound judicial decisionmaking.

Petitioner also contends (Pet. 13-14) that, because of the difficulty of establishing prejudice in a particular case, the failure to provide a defendant with counsel during a pretrial psychiatric evaluation should be conclusively presumed to be prejudicial. However, a conclusive presumption of prejudice cannot be justified on the ground that determining prejudice in a particular case is inherently

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[5] See *Hamilton* v. *Alabama*, 368 U.S. at 54-55 (reversal required in a capital case where defendant forfeited the right to enter an insanity plea at arraignment because he lacked counsel).

[6] Petitioner suggests (Pet. 10) that the absence of counsel could prejudice a defendant's ability to exercise his Fifth Amendment self-incrimination privilege. However, the Court's decisions make clear that the remedy for any such violation is suppression of the defendant's statements, not dismissal of the charges. See *United States* v. *Blue*, 384 U.S. 251, 255 (1966); cf. *United States* v. *Morrison*, 449 U.S. at 364-367. Moreover, in this case the Court of Military Appeals found (Pet. App. 13a n.5) that petitioner did not assert a Fifth Amendment claim below, and he raises no such claim in his petition.

impractical. See *United States* v. *Cronic*, 466 U.S. 648, 661-662 (1984); cf. *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970); *Avery* v. *Alabama*, 308 U.S. 444 (1940); compare *Holloway* v. *Arkansas*, 435 U.S. at 490-491. In this case, for instance, petitioner was able to suggest a variety of different ways in which he might have been prejudiced by the absence of an attorney. See Pet. App. 8a (listing petitioner's claims of prejudice). That the Court of Military Appeals rejected his claims shows only that they lacked merit, not that the court's inquiry was necessarily futile.

Nor does the decision below conflict with *Timmons* v. *Peyton*, 360 F.2d 327 (4th Cir. 1966) (en banc), or *Caudill* v. *Peyton*, 368 F.2d 563 (4th Cir. 1966), on which petitioner relies (Pet. 14-15 n.14). Neither decision adopted the per se rule that petitioner urges. In *Timmons*, the accused was confined in a psychiatric institution for more than three months after he was arrested, but before he received an attorney; the state refused to disclose the institution's psychiatric reports on the defendant to defense counsel; and the court found that if the defendant had been given a fair opportunity to present his insanity defense, there was "little doubt that a jury would have found that a reasonable doubt existed as to his sanity" (360 F.2d at 332). Therefore, the court held, the cumulative effect of the state's conduct violated the Sixth Amendment and the Due Process Clause by denying the defendant the opportunity to present an insanity defense (360 F.2d at 332). As the Court of Military Appeals correctly recognized (Pet. App. 10a), *Timmons* is clearly distinguishable from this case, because the delay in appointing counsel for petitioner did not in any way interfere with his ability to present his insanity defense.[7]

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[7] Moreover, to the extent that *Timmons* relied on the Sixth Amendment despite the fact that the defendant had not yet been charged with a crime (see 360 F.2d at 330), that ruling has not survived this Court's subsequent decision in *United States* v. *Gouveia*, *supra*.

The *Caudill* case is also inapplicable. Although *Caudill* cited and discussed *Timmons* in dicta (368 F.2d at 564-565), the only question that the court addressed in *Caudill* was whether the defendant received a public trial (*id.* at 565). The *Caudill* decision therefore provides no more assistance to petitioner than does the decision in *Timmons.*[8]

Finally, petitioner maintains (Pet. 15-16) that the Court of Military Appeals misapplied the *Chapman* harmless error standard by imposing on him the burden of proving that the Sixth Amendment violation in his case was prejudicial. In this respect, petitioner has misread the opinion below. The Court of Military Appeals clearly stated that, under *Chapman,* "the burden is on the Government to show that this constitutional error was harmless beyond a reasonable doubt" (Pet. App. 11a). In the passage of its opinion that is quoted by petitioner (Pet. 15-16), the Court of Military Appeals stated only that it was unwilling to presume that the error in this case was inherently prejudicial and thereby deny the government the opportunity to carry its burden under *Chapman.*

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[8] Petitioner's reliance (Pet. 13) on *Geders* v. *United States,* 425 U.S. 80 (1976) (defendant barred from consulting with his attorney during an overnight recess), and *Herring* v. *New York,* 422 U.S. 853 (1975) (defense counsel not allowed to present a summation in a nonjury trial), is also misplaced, since both cases involved restrictions imposed at trial on a defendant or his attorney. *Ake* v. *Oklahoma,* No. 83-5424 (Feb. 26, 1985), also offers petitioner no aid, since petitioner never sought the appointment of a defense psychiatrist at trial. See *Caldwell* v. *Mississippi,* No. 83-6607 (June 11, 1985), slip op. 1-2 n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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